In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1148

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Hoyt C. Cupp, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 24, 1972, and amended, on petition for rehearing, on January 18, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon affirming Naughten's armed robbery conviction, Appendix A hereto, is reported at 3 Or. App. 241, 471 P.2d 830 (1970). The opinion of the United States Dis-

trict Court for the District of Oregon denying Naughten's petition for habeas corpus relief, Appendix B hereto, is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the district court and the order on petition for rehearing amending that opinion, Appendices C and D hereto, are not yet reported. The separate opinion which Chambers, C. J., expressed his intention to file in the order on petition for rehearing is not yet reported, and has not been received by counsel to date, but will be presented in a supplement to this petition as soon as possible.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, Appendix C hereto, was entered on May 24, 1972. A timely petition for rehearing en banc was denied on January 18, 1973 (see Appendix D hereto), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Does the Fourteenth Amendment prohibit an instruction to the jury in a state criminal trial, that all witnesses are presumed to speak the truth and describing the manner in which the presumption may be overcome, notwithstanding other specific instructions on the presumption of innocence and the burden of proof in criminal cases?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A state court jury convicted Hugh Naughten of the crime of assault and robbery while armed with a dangerous weapon. The conviction was affirmed by the Oregon Court of Appeals, *State v. Hugh Kyle Naughten*, 3 Or. App. 241, 471 P.2d 830 (1970). (Appendix A). Petition for review was denied by the Oregon Supreme Court on September 22, 1970.

Naughten commenced the present federal habeas corpus action in the United States District Court for the District of Oregon, pursuant to 28 USC §§ 2241, et seq. The district court, per Solomon, J., denied the petition (Appendix B). On appeal, the Ninth Circuit, in an opinion by Ely, J., joined by Jertberg and Hufstedler, JJ., reversed and remanded (Appendix C).

Thereafter, petitioner, Hoyt C. Cupp, filed in the Ninth Circuit a petition for rehearing and suggestion of appropriateness for rehearing en banc. By a vote of six judges in favor of granting rehearing and six judges opposed, the petition for rehearing was denied (Appendix D). The separate opinion of Chambers, C. J., who voted in favor of granting rehearing, had not been received as of the filing of this petition, and petitioner will supplement the petition when that opinion is filed. Naughten's present custodian, the petitioner herein, seeks review of the Ninth Circuit's decision.

Only one issue has been raised and preserved throughout these proceedings. That issue is whether the giving of a challenged instruction so placed the burden on Naughten to prove his innocence as to entitle him to relief in federal habeas corpus.

Naughten was tried before a state-court jury on the charge of assault and robbery while armed with a dangerous weapon. There was testimony at the trial that on August 17, 1968, a robbery occurred at a Quickie Mart in Portland, Oregon (Tr. 9-12). The owner, Mr. Livengood, identified Naughten as the robber. (Tr. 27). Mr. Weisinfluh, an eyewitness, also identified Naughten as the robber. (Tr. 61). Police officers Akers and Carpenter, who arrived on the scene shortly after the robbery, discovered Naughten near the scene. (Tr. 72-74, 88-89). Naughten did not testify and did not present any witnesses.

The trial court instructed the jury:

"Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption". (Tr 137).

The instruction was based on Oregon statutory law. ORS 44.370. Naughten excepted to the giving of the instruction (Tr. 1), and the instruction was assigned as error on appeal following conviction.

The trial court instructed the jury on the elements of the offense and other pertinent matters, including the following instructions on the burden of proof, presumption of innocence and the function of the jury in evaluating the evidence.

"* * * [T]he jury is the sole and exclusive judges of the facts and of the reliability to be given the testimony of any witness. Its findings as to the facts are final, and there is no procedure for correcting any mistakes it may make as to the facts. The jury's power, however, is not arbitrary; and if the Court instructs you as to the law on a particular subject or how to judge the evidence, you must follow such instructions. It is of the utmost importance, therefore, that in performing your functions as jurors, you understand the instructions which I shall give to you." (Tr. 133)

"The law provides for certain disputable presumptions which are to be considered as evidence.

"A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence. However, since these presumptions are disputable presumptions only, they may be out-weighed

or equaled by other evidence. Unless out-weighed or equaled, however, they are to be accepted by you as true.

"The law presumes that the defendant is innocent, and this presumption follows the defendant until guilt is proved beyond a reasonable doubt.

"Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.

"Burden of Proof. The burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt.

"Reasonable doubt means an honest uncertainty as to the guilt of the defendant." (Tr. 137).

"A reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs.

"Your verdict should be based only upon these instructions and upon the evidence in this case. It is your duty to weigh the evidence calmly and dispassionately and to decide the questions upon their merits. You are not to allow, bias, sympathy, or prejudice any place in your deliberations, for all parties are equal before the law. Neither are you to base your decisions on guesswork, conjecture, or speculation. Furthermore, you must not consider what sentence might be imposed upon the defendant.

"In deciding this case you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question.

"A witness found to be intentionally false in a part of his or her testimony is to be distrusted in others. The term "witness" includes the parties.

"You are not bound to find in conformity with the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence." (Tr. 138-139).

At the conclusion of the prepared instructions, there was a conference out of the presence of the jury. The following colloquy occurred:

"MR. HOWLETT: I didn't prepare an instruction about the defendant not having the burden of—that he need not take the witness stand, and no inference of guilt should be considered upon his failure to do so, but if the Court would do it,—

"THE COURT: Well, I don't know, with your supercritical attitude, I might—if you want to make a request, I will be glad to consider it.

"MR. HOWLETT: I will request it, your Honor.

"THE COURT: Well, in writing.

"MR. HOWLETT: All right, I can write it down.

(Pause.)

"THE COURT: Do you have any exceptions?

"MR. BRUUN: No, I have no exceptions, your Honor. I haven't seen the instruction, though.

(Thereupon, the instruction was handed to counsel for the State.)

"MR. BRUUN: Your Honor, isn't there a standard instruction for this?

"THE COURT: There is.

"MR. BRUUN: I have no objection.

"THE COURT: I don't know whether you are entitled to it or not, but I have never known of a defendant that didn't take the stand where he wasn't convicted, so I don't think it makes any difference.

(Thereupon, the Court, counsel, the defendant, and the reporter returned to the courtroom, where the following occurred within the presence of the jury:)

"THE COURT: Ladies and gentlemen of the jury, the Court in its instructions referred to burden of proof, and that the party upon whom the burden rests had the burden of proof. Of course, the defendant's plea of Not Guilty puts at issue every material allegation, matter and thing contained in the Indictment, and the presumption which belongs to the defendant and which goes with the defendant to the jury room of being not guilty relieves the defendant of any obligation for any burden of proof upon any facet of the case. And you are instructed that the defendant need not take the witness stand, and you may not infer any evidence of guilt from his failure to do so." (Tr 143-144).

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals, has, by a 6 - 6 decision not to grant rehearing, decided an important question of Fourteenth Amendment law in a way in conflict with the final decision of the courts of the State of Oregon on precisely the same question.

B. The Court of Appeals' decision has the effect of holding that any presumption in state criminal law which aids the prosecution conflicts with the presumption

of innocence if the defendant does not testify or present witnesses.

C. The Court of Appeals' decision holds in effect that a statute of the State of Oregon establishing a statutory presumption is unconstitutional as applied.

D. The Court of Appeals' decision is the first reported federal decision holding that an instruction on the presumption of truthfulness given in a state trial court violates federal constitutional principles. In view of the widespread use of the instruction, resolution of the question is important to avoid unnecessary friction in state-federal relations.

As noted above, the Oregon Court of Appeals held that the instruction that witnesses are presumed to speak the truth was not erroneous, relying upon a decision of the Supreme Court of Oregon in *State v. Kessler*, 254 Or. 124, 458 P.2d 432 (1969).

That decision found no error in giving the instruction if accompanied by an explanation of how the presumption can be overcome.

The Federal District Court recognized that similar instructions had been considered in other circuits, but that these cases did not involve appeals from state court convictions. The Federal District Court found that the instruction was proper under Oregon law and did not deprive the petitioner of a federally protected constitutional right, and that the evidence of guilt was so overwhelming that the instruction, even if erroneous, was

harmless under *Harrington v. California*, 395 U.S. 250 (1969).

The Ninth Circuit panel held that the effect of the challenged instruction was to place the burden on Naughten to prove his innocence, notwithstanding other instructions by the court. The panel further found that the constitutional error was not harmless beyond a reasonable doubt. The panel did not refer in its opinion to another decision of the Ninth Circuit, *Smith v. Cupp*, 457 F.2d 1098 (9th Cir. 1972) which had held that the issue was not of constitutional magnitude. On petition for rehearing, in the present case, the opinion of the panel was affirmed by a 6 - 6 vote not to grant rehearing.

The instruction in question has sometimes been criticized in federal prosecutions. See, *e.g.*, *United States v. Persico*, 349 F.2d 6, 19 (2d Cir. 1965); *United States v. Meisch*, 370 F.2d 768, 773 (3d Cir. 1966); *United States v. Bilotti*, 380 F.2d 649, 655 (2d Cir. 1967). In other cases, however, the giving of the instruction has been held not to be reversible error. *United States v. Gray*, 464 F.2d 632 (8th Cir. 1972). In no prior case which petitioner has discovered has a federal court held that the giving of the challenged instruction in a state criminal prosecution violates a federal constitutional right.

The purpose of an instruction such as the one involved herein is to prevent arbitrary and capricious results in the analysis of evidence. It is an additional caution to the jury of the grave task before them. The instruction is a far less restrictive and burdensome alternative from the defendant's point of view than the

court being permitted to comment on the evidence or guilt of the accused, as is allowed in the federal system. See *e.g., United States v. Spica*, 413 F.2d 129 (8th Cir. 1969). *Kyle v. United States*, 402 F.2d 443 (5th Cir. 1968); *Beck v. United States*, 140 F.2d 169 (D.C. Cir. 1943).

The claimed vice of the instruction is that it suggests to the jury that the defendant has the burden of overcoming the state's case. The instruction itself specifically refutes any such possible inference. In addition, the jury in this case was specifically instructed that the burden was upon the state to prove its case beyond a reasonable doubt, that the defendant was presumed to be innocent, and that he had no obligation to present a defense. The decision on the part of the defense to present evidence is a tactical one. If the defendant chooses not to call witnesses, that is his choice and he cannot raise his challenge to a constitutional level simply because he does not choose to call witnesses. See *Luna v. Beto*, 395 F.2d 35, 40 (5th Cir. 1968), cert. den. 394 U.S. 966 (1969) (concurring opinion). *Cf. California v. Green*, 399 U.S. 149 (1970).

The Ninth Circuit in its opinion stated that the instruction to the jury concerning the presumption that witnesses speak the truth violated due process guarantees, since it shifted the burden of proof to the defendant to prove his innocence. The opinion, in arriving at its conclusion without analysis, leads to the inescapable conclusion that presumptions *per se* are constitu-

tionally invalid, since all presumptions tend to have the same effects alluded to in the opinion. This is simply not the state of the law as has been held by this Court in the many cases challenging presumptions that aid the prosecution in establishing a substantive element of the crime. See *e.g., United States v. Gainey*, 380 U.S. 63 (1965); *Yee Hem v. United States*, 268 U.S. 178 (1925); *Tot v. United States*, 319 U.S. 463 (1943).

The decision of the Ninth Circuit cites many federal cases which have criticized the presumption-of-truthfulness instruction. Even if it is the federal view that the instruction is erroneous, and it is not certain that it is, this is the first case in which a federal court has imposed such a rule upon a state. Federal courts are not free to substitute their views of court procedures for those of the states, unless there is constitutional error and the constitutional mandate that is violated extends to the states through the 14th Amendment. See *e.g., Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (concurring opinion of Powell, J.) This is particularly true where, as here, the federal courts are dealing with matters of procedure regarding the conduct of criminal trial in state courts. Thus, the present case presents serious questions concerning the preservation of comity between state and federal relations. *Cf.* 28 U.S.C. § 2254.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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JOHN W. OSBURN
Solicitor General

THOMAS H. DENNEY
Assistant Attorney General
Counsel for Petitioner

February 1973

APPENDIX A

OPINION OF OREGON COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Respondent,
v.
HUGH KYLE NAUGHTEN, Appellant.

[3 Or. App. 241, 471 P.2d 830]

[July 9, 1970]

Department 2.

Appeal from Circuit Court, Multnomah County.

Charles W. Redding, Judge.

J. Marvin Kuhn, Deputy Public Defender, Salem, argued the cause for appellant. With him on the brief was Gary D. Babcock, Public Defender, Salem.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and Jacob B. Tanzer, Solicitor General, Salem.

Before Schwab, Chief Judge, and Langtry and Fort, Judges.

Affirmed.

PER CURIAM.

Defendant was tried and convicted upon jury trial of the crime of assault and robbery being armed with a dangerous weapon. He did not take the witness stand.

His sole ground of appeal is that the trial court erred in instructing the jury:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption."

This instruction is not erroneous. *State v. Kessler*, 254 Or 124, 458 P2d 432 (1969); *State v. Blank*, 1 Or App 550, 464 P2d 836 (1970).

Affirmed.

APPENDIX B

OPINION OF UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN, Petitioner,	)	
vs.	)	Civil No. 71-80
HOYT C. CUPP, Superintendent, Oregon State Penitentiary, Respondent.	)	OPINION November 4, 1971

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Lee Johnson,
Attorney General,
Jim G. Russell, Assistant Attorney General,
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Attorneys for Respondent.

SOLOMON, Judge:

Petitioner, Hugh Kyle Naughten, seeks habeas corpus relief from a judgment of conviction and sentence for armed robbery. He alleges that the trial court's instruction deprived him of his federally protected right to an acquittal unless the jury found him guilty beyond a reasonable doubt.

Petitioner was tried for the armed robbery of a grocery store. The owner of the store identified the petitioner and testified that petitioner pointed a gun at him and robbed the store. One eye witness corroborated the storekeeper's testimony. The two officers who arrested petitioner near the store also testified. Two pieces of clothing, identified as belonging to petitioner, were introduced in evidence along with a bag of money which the police found in the parking lot near petitioner's car.

Petitioner did not testify. Neither did he call any witnesses.

Over petitioner's objections, the Court instructed the jury:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption."

Petitioner asserted that this instruction diluted the presumption of innocence and in effect amounted to a presumption of guilt, even though the Court also instructed the jury that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt and that no adverse inference was to be drawn from the defendant's failure to testify. The Court also instructed the jury on how the presumption may be overcome.

The jury found petitioner guilty. He appealed the judgment of conviction and sentence. The Oregon Court of Appeals affirmed on the authority of *State v. Kessler*,

254 Or. 124 (1969), 458 P.2d 432, in which the identical instruction was approved, *State v. Naughten*, [3 Or. App. 241, 471 P.2d 830 (1970)], and the Oregon Supreme Court denied review.

In this habeas corpus proceeding the petitioner makes the identical contention he made in the State Court with respect to the instruction above quoted. By agreement this case was tried before me on the pleadings and on the record without oral testimony. The sole ground for relief is whether the instruction deprived petitioner of his federally protected constitutional right.

Like the Oregon courts, I find that there is no merit in petitioner's contention. Similar instructions have been criticized in *United States v. Meisch*, 370 F.2d 768 (3rd Cir. 1966), *United States v. Persico*, 349 F.2d 6 (2d Cir 1965), and in other cases in the Second and Third Circuits, but these cases do not involve appeals from State Court convictions.

I find that the instruction was proper under Oregon law. In any event, the giving of the instruction did not deprive petitioner of a federally protected constitutional right.

Here, the evidence of guilt was so overwhelming that the instruction, even if erroneous, was harmless under *Harrington v. California*, 395 U.S. 250 (1969).

Petitioner is not entitled to any relief.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52 (a).

Dated this 4th day of November, 1971.

Gus J. Solomon
United States District Judge

APPENDIX C

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUGH NAUGHTEN,	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	No. 71-3065
	)	
HOYT C. CUPP, Superintendent, Oregon State Penitentiary,	)	
	)	
Respondent-Appellee.	)	

[May 24, 1972]

Appeal from the United States District Court for the District of Oregon

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Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

ELY, Circuit Judge:

Naughten is an Oregon state prisoner, convicted of the offense of armed robbery. His direct appeal in the Oregon state courts was unsuccessful. *State v. Naughten*, 90 Adv. Ore. 1811, 471 P.2d 830 (App. 1970). Eventually, Naughten filed a petition for habeas corpus in the court below, and he now appeals from the denial of that petition.

In the state court trial, the judge, over Naughten's objection, instructed the jury as follows:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption."

Such an instruction has been almost universally condemned. *See United States v. Birmingham*, 447 F.2d 1313 (10th Cir. 1971); *United States v. Stroble*, 431 F.2d 1273 (6th Cir. 1970); *McMillen v. United States*, 386 F.2d 29 (1st Cir. 1967), *cert. den.* 390 U.S. 1031; *United States v. Dichiarinte*, 385 F.2d 333 (7th Cir. 1967); *United States vx. Johnson*, 371 F.2d 800 (3d Cir. 1967); *United States v. Persico*, 349 F.2d (2d Cir. 1965). *See also United States v. Safley*, 408 F.2d 603 (4th Cir. 1969); *Harrison v. United States*, 387 F.2d 614 (5th Cir 1968); *Stone v. United States*, 379 F.2d 146 (D.C. Cir. 1967). In *Stone v. United States, supra*, Judge, now Chief Justice, Burger, wrote:

> "[This] instruction has a tendency to impinge on the presumption of innocence. Lurking in such an instruction is the risk that the jury might conclude that they were required to accept the testimony of the prosecution's witnesses at face value, particularly when it is not contradicted by other witnesses."

379 F.2d at 147.

In the state court trial, Naughten did not testify, nor did he present any witnesses in his defense. Thus, the clear effect of the challenged instruction was to place the burden on Naughten to prove his innocence. This is

so repugnant to the American concept that it is offensive to any fair notion of due process of law.

The appellee contends that other of the court's instructions offset the vice of the instruction which we have quoted. We do not agree, for there was no instruction so specifically directed to that under attack as can be said to have effected a cure.

The appellee also contends that the instruction, even if fatally defective under the federal constitution, was, in the circumstances, harmless beyond all reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). We reject this argument also. Once Naughten established the infringement of a constitutionally protected right, the burden shifted to the appellee to establish that the error was harmless under the *Chapman* standard. From our examination of the transcript of the trial proceedings, we conclude that the appellee could not, in this case, meet that burden. *Cf. Anderson v. Nelson*, 390 U.S. 523, 20 L. Ed. 2d 81, 88 S. Ct. 1133 (1968).

Naughten is entitled to a new trial; therefore, upon remand, the District Court will hold the petition in abeyance for a reasonable period, not to exceed sixty days, so as to afford Oregon the opportunity to reprosecute Naughten should it choose to do so.

Reversed and Remanded.

APPENDIX D

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title omitted in printing]

[January 18, 1973]

Order on Petition for Rehearing

Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

The court amends its original opinion in the subject case as follows:

(1) The insertion of a footnote reference ⓓ after the word "objection," the last word of the first line of the second paragraph of the slip opinion of May 24, 1972.

(2) The addition of a footnote ⓓ reading as follows: "The fact that Naughten made a timely objection to the instruction deserves emphasis. Absent such an objection, he would be in no position to challenge it. This is because, in the circumstances of a particular case and because of other contents of the instruction, an accused's attorney might appropriately deem it strategically advantageous to the accused that the instruction be given."

The court's original opinion having been thus amended, the panel as originally constituted has voted to deny the petition for rehearing and to reject the suggestion for *en banc* rehearing.

The full court has been advised of the suggestion for

en banc rehearing and has been advised of the foregoing amendments to the court's original opinion.

A judge in active service having requested that a vote be taken on the appellee's suggestion for *en banc* rehearing, such a vote has been taken. Rule 35(b) Fed. R. App. P. Judges Chambers, Koelsch, Wright, Trask, Goodwin, and Wallace would have granted *en banc* rehearing, and Judge Chambers wishes it recorded that he presently intends to write and file, at a later date, a separate opinion explaining his views.

The other six judges in active service voted to reject the suggestion for *en banc* rehearing. The vote being equally divided, the suggestion for *en banc* rehearing is rejected.

Gilbert H. Jertberg

Walter Ely

Shirley M. Hufstedler
United States Circuit Judges